> A.L.R. 4th 16 (1981). 'While an accused's intelligence and literacy are important factors to be considered in determining whether he intelligently and voluntarily waived his constitutional rights and made a confession, weak intellect or illiteracy alone will not render a confession inadmissible.' *Hobbs v. State*, 401 So. 2d 276, 282 (Ala. Cr. App. 1981)."

" '*Whittle v. State*, 518 So. 2d 793, 796-97 (Ala. Cr.. App. 1987).'

"672 So. 2d at 1337.

> ". . . [I]t is well settled that ' "an expert opinion is not conclusive on the trier of fact even if the testimony was uncontroverted. Furthermore, the weight and credibility to be attributed to an expert witness is for the trier of fact." ' *State v. Austin*, 596 So. 2d 598, 601 (Ala. Crim. App. 1991), quoting *Clark Lumber Co. v. Thornton*, 360 So. 2d 1019, 1021 (Ala. Civ. App. 1978)."

Jackson v. State, 791 So. 2d 979, 1009-10 (Ala. Crim. App. 2000) (quoting *Dobyne v. State*, 672 So. 2d 1319 (Ala. Crim. App. 1994), aff'd, 672 So. 2d 1354 (Ala. 1995)).

During the suppression hearing, the appellant's sister, Ann Beasley, testified that the appellant did not read and write very well; that the appellant was slow and did not have

good communication skills: that, if the appellant did not understand something someone said to him, he would just agree without asking any questions; that the appellant could not learn well, could not comprehend, could not take tests, and had problems with simple things; and that she wrote all of the appellant's checks, paid his bills, read and interpreted his mail for him, helped him make decisions, and essentially made decisions for him. She also testified that the appellant finished the sixth grade; that the appellant went into the seventh grade, and that was the last time she remembered him going to school; that the appellant did not go to school because he was not like the other children and could not do the reading and writing; and that the appellant had been in special education classes. Beasley further testified that the appellant had a driver's license and drove a vehicle; that the appellant had been driving for about twenty years; that the appellant had been working at Ellard Construction for four or five years; that the appellant lived by himself in a trailer next to one of their sisters; that, when the appellant would get home, he would fix himself something simple to eat, watch television, straighten up his house a little bit, go to bed, and then go to work; that the appellant would go to the grocery store to buy food; and that the appellant had a wallet and was in charge of his own money. She also testified that the appellant had a history of injuries as a child; that there was a history of mental and physical problems in their family; and that she, the appellant, and some of their other siblings had been in special education classes.

Beasley testified that the appellant brought her a letter that he had received in the mail; that the letter stated that the appellant was supposed to attend a meeting at the Department

of Human Resources ("DHR") at 9:00 a.m. or 9:30 a.m. and that he needed to stop by the Alabaster Police Department to get some type of paperwork or documents; that she and the appellant went to the Alabaster Police Department; that she gave the appellant the letter and told him to go inside, give the letter to someone there, and pick up the paperwork; that she told the appellant not to talk to anyone; that she waited in her vehicle for the appellant; that, when the appellant did not come back, she went into the police department and asked a woman there if she had seen her brother; that she gave the woman the appellant's name and told her the appellant was supposed to be picking up paperwork; that the woman told her that the appellant was speaking with someone; that she told the woman the appellant was not supposed to be speaking with anyone, that his attorney could not be present, and that they were supposed to get some paperwork and go to the DHR office; that she asked the woman to get the appellant, and the woman said he would be finished in a minute; that she went back to her vehicle to wait for the appellant; that, a few minutes later, a law enforcement officer came out to her vehicle, gave her the appellant's keys and change, and told her that the appellant had been arrested; and that, a few minutes later, she telephoned the appellant's attorney.

Curtis Rigney of the Alabaster Police Department testified that he had been a lieutenant in the department's investigative unit; that a report had been filed against the appellant alleging that he had sexually abused an eleven-year-old girl; that a subpoena was issued for the appellant to appear at his office at 9:00 a.m. on November 1, 1999; that the appellant arrived around 8:00 a.m., and he took the appellant to his office; that Sergeant Lovelady was present;

that he read the appellant his *Miranda* rights from a form; that the appellant did not appear to have a problem with the rights notification; that he asked the appellant to sign the bottom of the form to acknowledge that he had been advised of his rights, that he was aware of his rights, and that he understood what was going on; that the appellant signed and dated the form and indicated that he understood his rights; that the appellant appeared to be coherent; that the appellant did not appear to be under the influence of any types of drugs or alcohol; that the appellant did not indicate that he had taken any medication or alcohol that would impair his judgment; that neither he nor anyone in his presence threatened the appellant or made any promises to him to get him to make a statement; that he felt that the appellant understood every portion of the *Miranda* rights that were explained to him; that he did not recall anyone telling him that the appellant had mental problems or was "slow"; and that he did not have any indications as to whether the appellant could or could not read and write. (R. 52.) He also testified that, when he started questioning the appellant, he advised him of the allegations that were included in the police report; that, at first, the appellant denied the allegations; that he told the appellant that the victim had been interviewed by a DHR investigator, her story was believable, and he did not believe him; that the appellant then changed his story; and that the appellant made specific statements rather than just answering yes and no questions. Rigney further testified that, after the appellant made the verbal statement, he asked him to give a written statement, but the appellant said that he did not want to do that; that he asked the appellant if he would give a tape recorded statement, and the appellant said that he would; that, while he was preparing the tape recorder, the

appellant said that he wanted to speak to an attorney before he made a taped statement; that that was the first time the appellant mentioned that he wanted an attorney; and that he did not continue the interview after the appellant requested an attorney. Finally, he testified that, after the interview, dispatch told him that a woman who claimed to be the appellant's attorney had telephoned and said that she did not want the appellant to make a statement.

In his statement, the appellant said that he drank about five cans of Budweiser beer on the day in question; that he and the victim were playing cards at the kitchen table; that he and the victim started talking about strip poker; that the victim asked him questions about sex; that he went to the bathroom; that, when he returned, the victim had taken off all of her clothes; that he licked the victim's vagina for a short period of time; that the victim asked him to stop, and he did; and that he then went back to the bedroom and went to sleep.

Dr. Kimberly Ackerson testified that she evaluated the appellant; that the appellant's verbal IQ was 69, which falls within the range of borderline to mildly mentally retarded; that the appellant's performance IQ was 81, which is classified as low average; that the appellant's overall full scale IQ was 73, which is classified as borderline; that the significant difference between the appellant's verbal and performance IQ indicated that his verbal and nonverbal skills were not evenly developed; that, based on her information about the appellant, that was caused by a previously undiagnosed learning disability, limited educational opportunities, and lack of motivation; that the appellant had

a dependent personality disorder; that people with dependent personality disorders cannot make decisions for themselves, rely on others to guide their behavior, have difficulty being assertive, do not feel competent in their abilities, and avoid confrontation; and that a person with dependent personality disorder is susceptible to subtle manipulative tactics used by law enforcement officers. She also testified that the appellant showed an extreme deficit in his ability to process verbal information that he had heard in a brief period of time, to recognize what the information meant, and to respond to the information; that the appellant had a basic understanding of his *Miranda* rights; that the appellant had deficits in his ability to explain how the *Miranda* rights apply, how they are significant to interrogations, and what the rights meant for him personally; that the appellant could provide a brief description of what the phrase "right to silence'" means, but he revealed some variability in really understanding when the right could be applied; that the appellant revealed a very basic understanding of how the information he provided to law enforcement could be used against him, but, in her opinion, he did not understand that the information could be brought out during a trial to secure a conviction; and that, although the appellant had an understanding that courts appoint attorneys for defendants, he showed some variability in his understanding of what counsel could do for him during an interrogation.

Ackerson further testified that the appellant told her that his sister told him that a letter that he had received had requested that he pick up some papers at the police department; that he went to the police department to get those papers and then leave and go to a meeting at the courthouse

at 9:00 a.m.; that, when he went to the police department, he was taken into a room and asked some questions; that the appellant told her his rights were read to him and that he signed them; that the appellant told her that signing his rights meant that he knew his rights; that the appellant said that he told the officer that he understood his rights; that the appellant told her he did not truly understand his rights and told the officer that he did " 'because he is a policeman. They are all supposed to be right. They are supposed to help people' "; that this reflected the appellant's dependency and his idea that the authority figure is the person in charge and is supposed to guide and help him; that the appellant told her that he just answered questions; and that, in her opinion, he was basically just complying with authority when he answered the questions. (R. 79.) She also testified that the appellant was a person who relied on visual stimuli to make sense of his world; that, in her opinion, the officer placing the tape recorder in front of him signified that that was an interrogation; and that, before that point, he did not understand that he was being interrogated and making a confession. Finally, she testified that she did not believe that the appellant had sufficient intellectual capacity to truly understand the significance of his *Miranda* rights, particularly with regard to his ability to assert his rights.

Dr. Glen David King testified that he performed a forensic evaluation on the appellant on September 30, 2002; that, after he received the order to evaluate the appellant, he telephoned the appellant and set up an appointment; that his interview with the appellant included a clinical interview and a mental status examination; that he conducted a structured interview with specific questions regarding the appellant's

statement about the offense, his understanding of the roles of the participants in a trial situation, and the seriousness of the charges against him; that he administered a competency to waive *Miranda* rights structured interview; and that he assessed the appellant's ability to understand and answer questions of varying complexity. He also testified that it was his understanding that the appellant had been arrested on three previous occasions; that he asked the appellant about the fact that he had been previously arrested, whether he had been previously advised of his *Miranda* rights, and about his understanding of those rights in the past; that there is data to indicate that, when a person has previously been advised of his *Miranda* rights, his understanding of his *Miranda* rights in the current situation is markedly higher; and that the appellant said that he could not remember whether he had previously been advised of his *Miranda* rights. King further testified that one of the appellant's previous arrests was for sexual abuse and that the appellant told him that " 'the case was nol prossed.' " (R. 122.) King also testified that he read the appellant his *Miranda* rights and asked him to explain each one; that the appellant demonstrated a basic understanding of those rights; that the fact that, at one point during the police interrogation, the appellant refused to answer questions and asked for an attorney indicated that he understood his rights at the time of the interrogation and the consequences of his actions; that it was reasonably apparent to him that the appellant probably functioned in the borderline range of intellectual ability; that, in terms of the ability to understand *Miranda* rights, when a person reaches the age of 30, his IQ level becomes irrelevant

as long as his full-scale IQ is above 70;[2] that, in his opinion, a basic understanding of *Miranda* rights is sufficient to be able to knowingly and intelligently waive those rights; and that he did not detect any information to indicate that the appellant did not voluntarily make his statement. Finally, he testified that he considered the fact that the appellant had been employed at the same place for the last five years; the fact that the appellant had a driver's license; the fact that the appellant has been married twice, and one of those marriages lasted for a long time; and the fact that the appellant was able to get himself to the courthouse to meet him.

Mark Spragg testified that he is a superintendent at Ellard Construction; that the appellant worked for him part-time; that he had known the appellant for five years or longer; that the appellant ran heavy equipment on a daily basis; that the appellant did excellent work; that, as long as the appellant was working with his hands, he was fine; that the appellant did not have to do a lot of figuring and calculations; that he would give the appellant the numbers he was supposed to read, and the appellant was able to write those down; that he had socialized with the appellant outside of work; that he did not ever have any indication that the appellant did not understand what he was talking about; that he has not ever observed the appellant being unable to communicate with him and other coworkers in an appropriate fashion; that, when they would start at a new job site, he would draw a map of how to get there; that the appellant was able to follow the instructions and get there on time; that, at times, the appellant had to drive the equipment next to the road, which required

2. The appellant was 37 years old at the time he made the statement to Rigney.

judgments as to how close to get to traffic and how to adjust to the traffic, and the appellant did fine; and that he did not know that the appellant could not read and write until one of the other supervisors told him.

Based on the testimony presented during the suppression hearing, the trial court could have reasonably concluded that the appellant was competent to waive his *Miranda* rights. The conflicting evidence simply presented a credibility choice for the trial court. *See Rutledge*, supra. Therefore, the trial court properly denied the appellant's motion to suppress his statement on this ground.

B.

The appellant also contends that his low IQ coupled with deception by Rigney during the interrogation rendered the waiver of his *Miranda* rights invalid. Specifically, he contends that Rigney used deception during the interview when he told the appellant that he believed the victim when, in fact, he had not interviewed the victim. However, during the suppression hearing, Rigney testified that he told the appellant that the victim had been interviewed by a DHR investigator, that the victim's story was believable, and that he did not believe him. He also testified that a DHR worker, Vicky Whitfield, had interviewed the victim; that he did not personally interview the victim; and that he relied on Whitfield's October 14, 2002, report regarding what the victim had told her. Therefore, it does not appear that Rigney used deception to obtain the statement. Accordingly, the appellant's argument is without merit.

Appendix A

C.

The appellant further contends that the trial court should have granted his motion to suppress his statement because law enforcement officers did not tell him "that an attorney ha [d] tried to reach him in order for him not to talk with the attorney not present." (Appellant's brief at p. 50.) During the suppression hearing, Rigney testified that, after the appellant had invoked his right to counsel and the interview had ended, dispatch notified him that a woman who claimed to be the appellant's attorney had telephoned and said that she did not want the appellant to make a statement. In *Moran v. Burbine*, 475 U.S. 412, 422-427, 106 S. Ct. 1135, 1141-44, 89 L. Ed. 2d 410 (1985), the United States Supreme Court addressed the issue of whether a defendant's statement is rendered involuntary when law enforcement officers do not inform him that an attorney has tried to reach him as follows:

> "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his Miranda rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional

information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. See, *e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 316-317, 105 S. Ct. 1285, 1296-1297, 84 L. Ed. 2d 222 (1985); *United States v. Washington*, 431 U.S. 181, 188, 97 S. Ct. 1814, 1819, 52 L. Ed. 2d 238 (1977). Cf. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *McMann v. Richardson*, 397 U.S. 759, 769, 90 S. Ct. 1441, 1448, 25 L. Ed. 2d 763 (1970). Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

"Nor do we believe that the level of the police's culpability in failing to inform respondent of the telephone call has any bearing on the validity of the waivers. . . . [W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his

Miranda rights unless he were at least aware of the incident. Compare *Escobedo v. Illinois*, 378 U.S. 478, 481, 84 S. Ct. 1758, 1760, 12 L. Ed. 2d 977 (1964) (excluding confession where police incorrectly told the suspect that his lawyer ' "didn't want to see" him'). Nor was the failure to inform respondent of the telephone call the kind of 'trick[ery]' that can vitiate the validity of a waiver. *Miranda*, 384 U.S., at 476, 86 S. Ct., at 1629. Granting that the 'deliberate or reckless' withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Because respondent's voluntary decision to speak was made with full awareness and comprehension of all the information Miranda requires the police to convey, the waivers were valid.

". . . .

"Nor are we prepared to adopt a rule requiring that the police inform a suspect of an attorney's efforts to reach him. While such a rule might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption. As we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of

its application. *Berkemer v. McCarty*, 468 U.S. 420, 430, 104 S. Ct. 3138, 3145, 82 L. Ed. 2d 317 (1984); see also *New York v. Quarles*, supra, 467 U.S., at 662-664, 104 S. Ct., at 2634-2636 (concurring opinion); *Fare v. Michael C.*, 442 U.S., at 718, 99 S. Ct., at 2568. We have little doubt that the approach urged by respondent and endorsed by the Court of Appeals would have the inevitable consequence of muddying *Miranda's* otherwise relatively clear waters. The legal questions it would spawn are legion: To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter? We are unwilling to modify *Miranda* in a manner that would so clearly undermine the decision's central 'virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.' *Fare v. Michael C.*, supra, at 718, 99 S. Ct., at 2568.

"Moreover, problems of clarity to one side, reading *Miranda* to require the police in each instance to inform a suspect of an attorney's

efforts to reach him would work a substantial and, we think, inappropriate shift in the subtle balance struck in that decision. Custodial interrogations implicate two competing concerns. On the one hand, 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041, 2046, 36 L. Ed. 2d 854 (1973). Admissions of guilt are more than merely 'desirable,' *United States v. Washington*, 431 U.S., at 186, 97 S. Ct., at 1818; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is 'inherently coercive' and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *New York v. Quarles*, *supra*, 467 U.S., at 656, 104 S. Ct., at 2631. *Miranda* attempted to reconcile these opposing concerns by giving the defendant the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, see Brief for American Civil Liberties Union as *Amicus Curiae* in *Miranda v. Arizona*, O.T. 1965, No. 759, pp. 22-31, the Court found that the suspect's Fifth Amendment rights could be adequately protected

by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

"The position urged by respondent would upset this carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendment privilege and injurious to legitimate law enforcement. Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt. Indeed, the very premise of the Court of Appeals was not that awareness of Ms. Munson's phone call would have dissipated the coercion of the interrogation room, but that it might have convinced respondent not to speak at all. 753 F.2d, at 185. Because neither the letter nor purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are

> unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation."

(Footnote omitted.)

The fact that the appellant's attorney had telephoned the police department and said that she did not want the appellant to make a statement was not relevant to whether the appellant knowingly and intelligently waived his *Miranda* rights. Moreover, the law enforcement officers were not required to inform the appellant that his attorney had telephoned the police department. Therefore, the trial court properly denied his motion to suppress his statement on this ground.

D.

Finally, the appellant contends that his Fifth Amendment right against self-incrimination was violated when the district attorney subpoenaed him to appear at the Alabaster Police Department. However, he did not raise this specific issue in his motion to suppress or during the hearing on his motion to suppress. "Specific grounds of objection waive all other grounds not specified at trial." *Smith v. State*, 602 So. 2d 470, 472 (Ala. Crim. App. 1992).[3] Therefore, this issue is not properly before this court.

3. The appellant raised this issue for the first time in his "Motion to Withdraw Best Interest Plea or in the Alternative Motion for a New Trial." However, "[a] motion to withdraw a guilty plea is the functional equivalent of a motion for a new trial." *Wallace v. State*, 701 So. 2d 829, 830 (Ala. Crim. App. 1997). "A motion for a new

(Cont'd)

For the above-stated reasons, we affirm the trial court's judgment.

AFFIRMED.

McMillan, P.J., and Cobb, Shaw, and Wise, JJ., concur.

(Cont'd)

trial must be filed no later than thirty (30) days after sentence is pronounced." Rule 24.1, Ala. R. Crim. P. The appellant was sentenced on February 3, 2004, and he filed a "Motion to Withdraw Best Interest Plea or in the Alternative Motion for a New Trial" on March 15, 2004. Because he did not file his motion within thirty days after he was sentenced, that motion was not timely. Moreover, even if that motion had been timely, it would not preserve this argument for our review. *See Hamrick v. State*, 548 So. 2d 652 (Ala. Crim. App. 1989) (holding that, absent a timely and sufficient objection at trial, a post-judgment motion will not preserve an issue for appellate review).

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF ALABAMA DATED APRIL 22, 2005

SUPREME COURT OF ALABAMA

1040239

Ex parte Kerry Neal Mullins

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re Kerry Neal Mullins

v.

State of Alabama)

(Shelby Circuit Court, CC-02-744;
Court of Criminal Appeals, CR-03-0910)

WOODALL, Justice.

Kerry Neal Mullins pleaded guilty to first-degree sodomy, a violation of § 13A-6-63(a)(3), Ala.Code 1975, and was sentenced to 15 years' imprisonment. Mullins appealed to the Court of Criminal Appeals, arguing that the trial court had erred in denying his motion to suppress the statement he made to law-enforcement officers. Although the State conceded that Mullins had reserved for appellate review the issues raised in his motion to suppress, the Court of Criminal Appeals, in an unpublished memorandum, dismissed Mullins's appeal. *Mullins v. State*, [No. CR-03-0910, August

27, 2004] __ So.2d __ (Ala.Crim.App.2004). In its unpublished memorandum, the Court of Criminal Appeals stated: "[Mullins] did not specifically reserve the right to appeal the denial of his motion to suppress *before* he entered his guilty plea. Therefore, he did not properly reserve the right to appeal the denial of his motion to suppress." (Emphasis in original.) After the Court of Criminal Appeals denied Mullins's application for rehearing, Mullins petitioned this Court for certiorari review, which we granted.

Before entering his guilty plea, a defendant must reserve any issue as to which he wishes to appeal. *Smith v. State*, 884 So.2d 3, 6 (Ala.Crim.App.2003). See also Ala. R.Crim. P. 26.9(b)(4) ("before entering the plea of guilty [the defendant must have] expressly reserved his or her right to appeal with respect to a particular issue or issues"). Although the Court of Criminal Appeals concluded that Mullins had not specifically reserved his right to appeal the denial of his motion to suppress before he entered his guilty plea, our review of the record leads us to a contrary conclusion.

The existence of a pre-plea reservation of the right to appeal is evidenced by the trial court's comments at the conclusion of the guilty-plea hearing. At that time, the trial court stated: "I do understand that you are in fact preserving for appeal the issue of the court's ruling on the suppression hearing on the motion to suppress. . . . [T]he court understands that the defendant is continuing to preserve that motion." The prosecutor took no exception to the trial court's statements.

Appendix B

When Mullins returned to court for sentencing, the trial court again acknowledged, without exception from the prosecutor, that Mullins had reserved his right to appeal with regard to the denial of his motion to suppress. The trial court stated:

> "I certainly understood that at the time we had that suppression hearing. I understood of it and the court acknowledged it at the time we took the plea and I again acknowledge it at the time set for today . . . [t]hat each of those issues are preserved and you are noted to have noted that on the record on each of those separate occasions."

After he was sentenced, Mullins filed a "Motion to Withdraw Best Interest Plea or in the Alternative Motion for a New Trial." A hearing was held on that motion, at which the trial court, for a third time, and again without exception by the prosecutor, confirmed that the suppression issue had been reserved for appeal. The trial court stated:

> "I will state . . . for the record that at all times counsel for the defendant has preserved for the record for appellate purposes the issue of a suppression that was covered in a suppression hearing pretrial. . . .
>
> "That issue that was raised at the suppression hearing was preserved for the record by reference back to that at the time of the plea and at the time of the sentencing. So, I mean it's always been the court's understanding and [defense counsel] have

> always made it clear on the record that you were preserving those issues when I denied your motion."

For the foregoing reasons, the judgment of the Court of Criminal Appeals is reversed, and the case is remanded for the Court of Criminal Appeals to consider the merits of Mullins's appeal.

REVERSED AND REMANDED.

Nabers, C.J., and See, Lyons, Harwood, Stuart, Smith, Bolin, and Parker, JJ., concur.

Appendix B

ORDER

IT IS ORDERED that the petition for writ of certiorari to the Court of Criminal Appeals is granted as to Grounds 2 and 3 only.

* * *

PER CURIAM - Nabers, C.J., and Houston, Lyons, Johnstone, and Woodall, JJ., concur.

APPENDIX C —APPLICATION FOR REHEARING OF THE ALABAMA COURT OF CRIMINAL APPEALS DATED OCTOBER 29, 3004

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2004-2005

CR-03-0910

Kerry Neal Mullins

v.

State of Alabama

Appeal from Shelby Circuit Court
(CC-02-744)

BASCHAB, JUDGE.

APPLICATION FOR REHEARING OVERRULED.

McMillan, P.J., and Wise, J., concur; Cobb, J., adheres to original dissent; Shaw, J., dissents, with opinion.

SHAW, JUDGE, dissenting.

I respectfully dissent from the denial of Kerry Neal Mullins's application for rehearing of this Court's dismissal, by unpublished memorandum, of his appeal. *Mullins v. State*, [No. CR-03-0910, August 27, 2004] __ So. 2d __ (Ala. Crim. App. 2004). Although I originally concurred to dismiss this appeal on the ground that Mullins had failed to properly

reserve the right to appeal the trial court's denial of his motion to suppress before entering his plea, upon further review, I believe the record is ambiguous in this regard. In response to the statement by Mullins's counsel that there was an issue to be reserved for appeal, made after the trial court had accepted Mullins's plea, the court stated:

> "Y'all are preserving the issue. I do understand that you are in fact preserving for appeal the issue of the Court's ruling on the suppression hearing on the motion to suppress. Not to give a whole argument away at this time in the record but the basic motion had to do with the defendant's lack of understanding of *Miranda* and his inability to understand *Miranda* and the warnings that were provided to him and the Court's denial of that motion to suppress. And the Court understands the defendant is *continuing* to preserve that motion. It will preserve that motion post-plea and post-sentence and may appeal on that issue."

(R. 178-79.) (Emphasis added.) The trial court's reference to Mullins's "continuing" to preserve the issue suggests that there may have been a preexisting agreement between the parties that Mullins was reserving his right to appeal as to the suppression issue. Therefore, based on *Smith v. State*, [Ms. CR-02-0697, August 29, 2003] __ So. 2d __ (Ala. Crim. App. 2003), and *Rivers v. State*, 666 So. 2d 33 (Ala. Crim. App. 1994), I would grant Mullins's application for rehearing and remand this case for the trial court to supplement the record so as to clarify whether there was a preexisting agreement between the parties that Mullins was reserving the right to appeal as to the suppression issue.

APPENDIX D — APPLICATION FOR REHEARING OF THE COURT OF CRIMINAL APPEALS, STATE OF ALABAMA DATED JULY 1, 2005

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

July 1, 2005

CR-03-0910

Kerry Neal Mullins v. State of Alabama
(Appeal from Shelby Circuit Court: CC02-744)

NOTICE

You are hereby notified that on July 1, 2005 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

Lane W. Mann, Clerk
Court of Criminal Appeals

APPENDIX E — CERTIFICATE OF JUDGMENT OF THE SUPREME COURT OF ALABAMA DATED AUGUST 12, 2005

IN THE THE SUPREME COURT OF ALABAMA

August 12, 2005

1041504

Ex parte Kerry Neal Mullins. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Kerry Neal Mullins v. State of Alabama) (Shelby Circuit Court: CC02-744; Criminal Appeals : CR-03-0910).

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COST TAXED TO PETITIONER.

WOODALL, J. - Nabers, C.J., and Lyons, Smith, and Parker, JJ., concur.